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877283—50

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 591

GEORGE F. CROESSANT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court rendered no formal opinion at judgment. Its opinion denying a motion for judgment of acquittal (R. 77–78) is reported at 84 F. Supp. 514. The opinion of the Court of Appeals (R. 83–86) is reported at 178 F. 2d 96.

JURISDICTION

The judgment of the Court of Appeals was entered on November 28, 1949. (R. 87.) A petition for rehearing was denied on December 28, 1949. (R. 91.) The time for filing a petition for a writ of certiorari was extended by Mr. Justice Burton to and including February 10,

1950 (R. 92), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Whether a conviction under Section 145 (b) of the Internal Revenue Code—penalizing a willful attempt in any manner to evade or defeat a tax—may be sustained where the knowing filing of a false and fraudulent return constitutes the affirmative willful attempt to evade and defeat the tax.

2. Whether the evidence was sufficient to sustain the petitioner's conviction under Section 145 (b) of the Internal Revenue Code.

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 145. PENALTIES.
>
> * * * * *
>
> (b) *Failure to collect and pay over tax, or attempt to defeat or evade tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000 or imprisoned for

not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1946 ed., Sec. 145.)

STATEMENT

The petitioner was charged in a four count indictment, returned in the Eastern District of Pennsylvania, with having wilfully attempted to defeat and evade a large part of his individual tax liability for the calendar years 1942 to 1945, inclusive, in violation of Section 145 (b) of the Internal Revenue Code, by filing and causing to be filed for each calendar year a false and fraudulent tax return. The indictment contained the following material allegations as to the respective charges (R. 3–5):

Calendar year	Income reported	Actual income	Tax reported	Actual tax due
1942	$35,078.82	$86,022.98	$15,388.74	$52,562.62
1943	44,143.69	81,502.46	26,495.59	51,330.87
1944	35,116.60	45,116.60	16,878.40	23,922.45
1945	32,668.79	51,882.32	15,219.71	29,023.21

The petitioner was tried before Judge Guy K. Bard, sitting without a jury. (R. 6.) The petitioner was found guilty as charged and sentence was imposed as follows: imprisonment for 35 days and a fine of $250 as to count 1; a fine of $250 as to each of counts 2, 3 and 4, the petitioner to be imprisoned pending compliance. (R. 79.) The Court of Appeals affirmed (R. 87).

The petitioner operated a machine shop and employed some 30 to 42 individuals. During 1943 to 1946 he employed no accountant. He had devised his own system of keeping books. (R. 34, 51.)

The revenue agent commenced an examination of the petitioner's books on January 15, 1947, making a comparison of these with the original returns filed by petitioner for each of the years involved. He found that as to each year there was a discrepancy between the amount of sales reported on the return and those disclosed by the records, resulting in the following amounts of understatement of net income in the returns: 1942—$34,115.64 (R. 11); 1943—$29,272.49 (R. 11); 1944—$10,000 (R. 9); 1945—$19,213.53 (R. 10). By the same method of comparison the revenue agent further ascertained that the petitioner's returns for 1942 and 1943 had overstated expenses, resulting in the following additional amounts of understated net income: 1942—$16,838.92 (R. 11, 16); 1943—$8,086.28 (R. 11, 24). Included in the total overstatement of expenses for 1942 was a claim in the return for that year in the amount of $1,554.97 for advertising expenses. The advertising account on the petitioner's books for 1942 was recorded as an expenditure of only $54.97. (R. 16–17.) Similarly, for 1943 the petitioner's books showed an advertising expense of $535.39; the petitioner, however, claimed $1,535.38 on his return. (R. 25.)

After the investigation in this case had commenced, the petitioner retained a certified public accountant who filed amended returns for each of the calendar years involved, in which, except for a few dollars, the petitioner reported the full amount of the tax for each year charged by the Government to be owing. The amended returns were prepared by the certified public accountant from the petitioner's books and records. (R. 8, 35.)

The petitioner was not able to explain the aforementioned discrepancies between the amounts of sales and expenses as shown by his records and the returns filed. He stated that his records correctly reflected all of the business net income which should have been reported in his tax returns (R. 9, 10, 29, 30); that he had just made a mistake and wanted to get it straightened out (R. 15).

The total sales shown on the petitioner's books agreed with the bank deposits made. (R. 14.) The bank deposits represented sales, exclusively. (R. 13, 52.) During 1942, the petitioner's bank deposits had increased over-all by $32,000 and he had made personal withdrawals of approximately $40,000. He reported a net income of approximately $35,000 for 1942, although the total of the increase in bank deposits and withdrawals was approximately $72,000. During 1943, the petitioner's bank deposits increased in the amount of $800 and his personal withdrawals amounted

to $77,000. The net income which he reported for 1943 was approximately $44,000, as compared with the total of bank account increases and withdrawals in the amount of $77,838.34. During 1944, the petitioner's personal withdrawals were approximately $33,000 and his cash position increased by $11,434. The net income which he reported for 1944 was approximately $35,000, as compared with the total of the bank deposit increases and withdrawals of approximately $45,000. The relationship of the amounts reported for each year to the total of bank deposit increases and withdrawals did not strike the petitioner as being odd. (R. 73.)

The petitioner prepared the returns for each of the years involved without assistance from anyone. This conformed to his practice since he had begun business in 1925. (R. 15.) Miss Dorothy Gish, his bookkeeper, billing clerk and secretary, testified that during the period of her employment (1943 to 1946) the petitioner would go into his private office "from time to time for several days—maybe for a week, * * *" during the income tax period but that she was not able to tell how much time the petitioner devoted to "the income tax." The figures appearing in the tax returns (for 1944 and 1945) were handed to her by the petitioner and all that she did was to type them in the returns. (R. 31–32.)

ARGUMENT

I

Petitioner relies on *Spies* v. *United States*, 317 U. S. 492, to support his primary contention that the offense of attempted tax evasion proscribed by Section 145 (b) of the Internal Revenue Code cannot be proved by a showing that a defendant filed a false income tax return, that he knew it was false, and that he willfully attempted to defeat and evade taxes by filing such a false return. But, contrary to petitioner's claim, the *Spies* case does not demand that in every Section 145 (b) prosecution there be proof of concealment of income in the conduct of the taxpayer's business or financial affairs (Pet. 11, 12, 16, 17, 20), nor does it require that in a tax evasion case the willful attempt to evade and defeat the tax be constituted by an affirmative act *other* than the knowing filing of a false and fraudulent return.

Spies was a no-return case in which the Government based its charge of willfully attempted evasion upon the defendant's failure to file. The Court held that this omission, i. e. the non-observance of the statutory duty to make a return (defined as a misdemeanor under Section 145 (a) of the Code), could not constitute the affirmative action contemplated by the use of the term "attempt" in Section 145 (b). 317 U. S., at 499. By way of illustration only, the Court enumerated certain acts from which "affirmative

willful attempt may be inferred," even in a case in which there is "default in filing the return and paying the tax" (pp. 499–500). That the list did not include the act of filing a false and fraudulent return cannot avail petitioner, since it is obvious that such an affirmative act would not be pertinent to a case involving no return at all. On the contrary, it is clear that this Court did not intend to foreclose consideration, in a case in which a return is made, of the filing of a false and fraudulent return as a means of attempted evasion. The Court not only warned (p. 499):

> Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished "in any manner."

but it specifically announced that "affirmative willful attempt may be inferred from * * * *any conduct, the likely effect of which would be to mislead or to conceal*" (italics supplied).

Nor is the court below in conflict with the Fifth Circuit. In *Jones* v. *United States,* 164 F. 2d 398 (C. A. 5), the conviction was reversed because the trial court, in addition to other serious errors, had apparently instructed the jury that a knowing failure to return the taxpayer's full income was sufficient, in itself, for conviction

under Section 145 (b). Here, on the other hand, the trial judge expressly found not only a "wilful omission * * * in the tax return" but, in addition, he also found that combined with that omission there was a "deliberate intent to evade the tax (R. 77).[1] Furthermore, if the *Jones* opinion ever created any doubt as to how the Court of Appeals for the Fifth Circuit had read the *Spies* decision, the Fifth Circuit has decisively negatived any conflict with the court below by its later decision in *Barrow* v. *United States,* 171 F. 2d 286, which is in square accord with the instant holding. The Eighth Circuit also appears to be in agreement. *Cave* v. *United States,* 159 F. 2d 464, 466–467, certiorari denied, 331 U. S. 847; *Myres* v. *United States,* 174 F. 2d 329, 334, certiorari denied, 338

[1] Petitioner erroneously asserts that the prosecution's theory was that his mere failure to return income is sufficient to make him guilty of violating Section 145 (b), and that the trial judge accepted this theory (Pet. 20). The court's findings, referred to above, show that the court entertained no such misconception. Nor did the Government proceed on this theory. Petitioner's contention rests solely on a statement of Government counsel that "the evasion consists of two things, * * *; a failure to report sales and an overstatement of expenses incurred in the sales" (R. 7). It is clear from a reading of the entire record that this statement was not intended as an exposition of the theory of the Government's case. It merely purported to explain how the petitioner's understatement of net income, an essential element in the prosecution's case, was effected, and in that context it was clearly correct.

U. S. 849; cf. *Kirsch* v. *United States,* 174 F. 2d 595 (C. A. 8).

It may be assumed, for present purposes, that the evidence in this case would have supported convictions for the lesser offenses, dealing with false returns, established by Section 145 (c) and Section 3616 (a) of the Internal Revenue Code. It does not follow, of course, that these facts cannot also sustain a conviction under Section 145 (b), nor that prosecution must be had only under the narrower provisions. See *Taylor* v. *United States,* C. A. 9, decided January 19, 1950 (1950 P-H, par. 72, 376), rejecting contentions similar to those advanced here.

II

The evidence was sufficient to sustain a conviction under Section 145 (b). All of the elements of the offense defined by this Section were proved: (a) the petitioner substantially understated his net income for each of the years involved; (b) he attempted to evade and defeat by filing false and fraudulent returns; (c) he did the latter willfully. In this connection, it is of course not necessary that the Government prove willfulness or deliberate intent to evade by direct evidence; it may be inferred from all of the circumstances in a case. *Tinkoff* v. *United States,* 86 F. 2d 868 (C. A. 7), certiorari denied, 301 U. S. 689, rehearing denied, 301 U. S. 715; *Paschen* v. *United States,* 70 F. 2d 491 (C. A. 7); *United*

States v. *Commerford,* 64 F. 2d 28 (C. A. 2), certiorari denied, 289 U. S. 759; *Cooper* v. *United States,* 9 F. 2d 216 (C. A. 8).

CONCLUSION

The decision below is in all respects correct, and there is no occasion for further review. No conflict of decisions is presented. It is therefore respectfully submitted that the petition should be denied.

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